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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re J.R., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.R.,

Defendant and Appellant.

A133585

(Del Norte County
Super. Ct. No. JDSQ10-6184)

I. INTRODUCTION

This is an appeal from an order following a dispositional hearing on two juvenile petitions filed pursuant to Welfare and Institutions Code section 602. With regard to the first petition, the court sustained allegations of attempted robbery (Pen. Code, § 211),¹ resisting a peace officer (§ 148), and minor in possession of an alcoholic beverage (Bus. & Prof. Code, § 25662). With regard to the second petition, the juvenile court sustained allegations of second degree burglary (§ 459), second degree robbery (§211), kidnapping (§ 207. subd. (a)), false imprisonment (§ 236); felony vandalism (§ 594, subd. (a)(2), destruction of a telephone line (§591), and petty theft (§ 488). The court adjudged J.R. a ward of the court, placed him in the Bar O Boys Ranch and fixed his maximum period of confinement at 14 years and 4 months.

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

On appeal, J.R. argues (1) there is insufficient evidence of asportation to support the court's finding as to the kidnapping count; (2) the finding of false imprisonment must be reversed because false imprisonment is necessarily included within kidnapping; (3) the finding of petty theft must be reversed because it is a necessarily included offense of robbery; (4) the robbery finding must be stayed pursuant to section 654 because it has the same objective as the kidnapping; (5) the second degree burglary sentence must be stayed pursuant to section 654 because it had the same intent and objective as the kidnapping and robbery offenses; (6) the finding of witness dissuasion must be stayed pursuant to section 654; (7) the juvenile court failed to determine whether certain counts are felonies or misdemeanors; (8) the maximum period of confinement in the dispositional order should be modified because it was improperly calculated; (9) certain probation conditions should include a "knowledge" provision; (10) the juvenile court did not comply with the notice provisions of the Indian Child Welfare Act; and (11) the juvenile court should not have re-appointed J.R.'s former lawyer because he had a conflict of interest.

The People concede a number of these points. Specifically, they concede that the false imprisonment and theft findings must be vacated because these offenses are included in kidnapping and robbery, respectively. The People also concede that the matter should be remanded to the juvenile court to exercise its discretion to determine whether certain offenses are misdemeanors or felonies, and to recalculate the maximum period of confinement. Finally, the People concede certain of the probation conditions imposed by the court should be modified.

With regard to the People's concessions as to the juvenile court's errors, we find that the juvenile court did so err. We also find that substantial evidence does not support the kidnapping finding. Finally, the juvenile court erred in reappointing J.R.'s former lawyer. We affirm the remainder of the order and remand for proceedings consistent with this opinion.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *July 4, 2009, Incident*

1. *Kay Fat Chan testimony*

Kay Fat Chan, the victim in this incident,² owns a restaurant in Crescent City, California. At around 10:30 p.m. on July 4, 2011, a day on which the restaurant was closed, he was sitting in a booth in the dining room reading the newspaper, when J.R.³ came into the dining room from the kitchen. J.R. was holding a knife that was about six inches long and appeared to have been taken from the restaurant's kitchen. J.R. pointed the knife at Chan and told him to take out his wallet. Chan gave it to him and J.R. took the money in the wallet, which amounted to 30 or 40 dollars.

At around the same time, two other men came into the dining room. Chan was frightened and did not look at any of the men directly, but he thought that these men were also carrying knives. After J.R. took the money from Chan's wallet, he and his two companions went to the cash register. Unable to open it, they asked Chan to do it for them. There were only coins in the cash register.

The men had Chan stand in the middle of the restaurant after they emptied the cash register. At that point, one of the men cut the telephone line located near the cash register using the knife. Chan put his hands up and bent his head in order to demonstrate that he didn't "want to have any struggle with them or against what they want to do."

The man who cut the telephone line paced back and forth and repeatedly asked Chan why there was no money in the cash register. The other two men had, by this time, disappeared from the dining room. The remaining man instructed Chan to sit on top of a table in the dining room. While Chan was seated, the other two men returned and took some beer out of a cooler in the dining room.

²The robbery of Chan's restaurant was the subject of the second petition filed with regard to J.R., but was the first offense allegedly committed by him.

³ One of the three men involved in the robbery, 16-year-old I. K., testified pursuant to a plea bargain that this man was J.R.

One of the men asked Chan where the restaurant manager's office was located. Chan told him that the restaurant was small and had only a spare storage room. The person to whom Chan was speaking asked Chan to direct him to the storeroom. Chan walked with him to the back of the restaurant where the storeroom was located. Chan pointed out that the restaurant was closed and he had no money. As Chan explained, "when [the man] saw that the room did not have the things he wanted . . . [he] appeared to be unhappy and yelled out . . . loudly. . . . I felt that he wasn't happy . . . when he saw the storeroom." The man expressed his frustration by cutting two lines into the drywall with his knife. He then took the film out of a broken security camera that was in the storeroom and used his knife and feet to destroy it.

The man left through the back door and Chan stayed in the storage room, thinking it prudent to be sure all the men had left before leaving the storage room. After about five minutes, Chan went to the back door to lock it. However, one of the men came back inside and Chan immediately retreated into the storeroom. The man went into the dining area. Chan later discovered that he had broken a television, two glass partitions, and a fish tank.

Chan then saw the man leave through the back door. He waited in the storeroom for 15 minutes and then locked the restaurant's back door. After doing so, he walked over to the nearby Safeway and found someone to call the police.

2. I.K.

I.K.,⁴ who was 16 years old at the time of trial, had been friends with J.R. for a few years. He was with J.R. and another friend, J.G., the night of July 4, 2011.

At some point during that evening, he, J.R., and J.G. entered the restaurant. J.R. went into the restaurant alone through the back door as "kind of a joke." He came outside about a minute later with some grapes, which they ate.

⁴ I.K. had earlier admitted to the allegations of burglary and cutting phone lines during the Chan robbery.

After a while, all three of them went into the restaurant through the back door, which led into the kitchen. They stopped and looked around “kind of scared . . . nervous.” Seeing some butcher knives in the kitchen, they picked them up.

J.R. went into the dining room. I.K. heard him yelling at Chan, and then he (I.K.) followed him into the dining room. He heard J.R. say something to Chan like “This is a robbery. You know the drill.” Chan threw his wallet on the table and I.K. took the money from the wallet and put it in his pocket. They told Chan to open the cash register and I.K. took about four cans of beer from the cooler. He handed the beer to J.G. He also cut the phone lines in the back of the restaurant. He didn’t see anyone cut the phone lines in the front of the restaurant, but he thought J.R. might have done so.

I.K. noticed that Chan was “kind of crouched in the corner” of the dining room at this point and they told him not to move. J.R. was filling a box with beer and I.K. took the box outside. I.K. went by himself to an area where there were movie theaters and sat waiting for his friends. After a while, he decided they weren’t going to return right away, so he went back inside the restaurant. He found J.R. by the back door. J.R. pointed toward the storage room, where J.R. was with Chan. I.K. observed that “[J.R.] had a knife, and it kind of looked like Chan was crying . . .” At that point, I.K. left the restaurant by himself.

B. *July 5, 2011, Incident*

Mark Crawford testified that after eating at a Denny’s restaurant in the early morning hours of July 5, 2011, he was mugged by a man who said he had a gun who directed him to empty his wallet. Crawford refused, turned around, and grabbed the man’s hand, which did not have anything in it. The man ran off.

The police were called and when they arrived soon after the call, they chased the suspect. A short time later, Crawford identified J.R. as the man who had attempted to rob him. J.R. later admitted that he had attempted to rob Crawford.

C. *Jurisdictional Findings*

After hearing evidence on July 19, 2011, regarding the July 5, 2011, incident involving Mark Crawford, the juvenile court found true all of the allegations in the

petition filed regarding this incident. Specifically, the court found proven the following offenses: attempted robbery (§ 211), resisting a peace officer (§ 148), and minor in possession of an alcoholic beverage. (Bus. & Prof. Code, § 25662.)

The jurisdictional hearing on the July 4, 2011, incident was held on August 24 and 25, 2011. At that time, the juvenile court found true the following offenses: second degree burglary (§459), kidnapping (§207, subd. (a)), false imprisonment (§236), dissuading a witness (§136.1, subd. (b)), felony vandalism (§594, subd. (a)(2)), destruction of telephone lines (§591), and petty theft (§488).

D. *Dispositional Hearing*

At a dispositional hearing held on September 8, 2011, the juvenile court declared J.R. a ward of the court pursuant to Welfare and Institutions Code section 602. The court placed him on formal probation and, further, placed him at the Bar O Boys Ranch.

The court stayed sentencing, pursuant to section 654, on a number of offenses. It stayed the false imprisonment count in lieu of kidnapping, the destruction of telephone lines in lieu of vandalism and the petty theft offense in lieu of the sentence for second degree robbery.

This timely appeal followed.⁵

III. DISCUSSION

A. *Kidnapping*

The juvenile court found that the movement of Chan from the restaurant's dining room to its storage room at J.R.'s direction constituted kidnapping.

J.R. now argues that substantial evidence does not support the court's finding. We agree.

Our task on appeal is to "review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d

⁵ J.R. raises no issues regarding the first petition involving the attempted robbery of Mark Crawford.

557, 578.) “ ‘ “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. ‘ “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ [Citations.]” ’ ” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Aggravated kidnapping, as it is defined in section 209, subdivision (b)(2), occurs when “the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.” The courts have consistently found that a defendant’s movement of a robbery victim from one room to another in a store or home in search of money or valuable items is insufficient movement to satisfy the asportation requirement but is, rather, “incidental” to the crime itself. In *People v. Sheldon* (1989) 48 Cal.3d 935, 952 (*Sheldon*), for example, the victim of a robbery was “confronted . . . in her garage, forcibly pulled . . . into the house (adjoining the garage), and dragged . . . through the hall, kitchen, dining room and finally into the den.” The court pointed out that “[a]lthough the record does not reveal the distances involved, it does appear that the asportation took place almost entirely within the [victim’s] home.” (*Ibid.*) The court found that, in this factual scenario, “the asportation at issue was too minor to constitute kidnapping” (*Id.* at p. 953.)

Similarly, in *People v. Hoard* (2002) 103 Cal.App.4th 599, 607 (*Hoard*), the defendant entered a jewelry store, displayed a gun and took the key to the jewelry cases. He then moved the women who worked in the store into a back office and bound them before he returned to the front of the store and robbed it. One of the women in the back room tried to call the police and, when the defendant discovered that she had done so, he pulled the store’s phone out of the wall. The *Hoard* court concluded that the defendant’s movement of the two women from the front of the business to an office in the back

“women served only to facilitate the crime with no other apparent purpose.” The court held this movement “ ‘merely incidental’ ” to the robbery and reversed the defendant’s robbery conviction. (*Ibid.*)⁶

As Chan described it at trial, he told J.R., in response to J.R.’s question about the location of the restaurant’s office, that the restaurant was too small to have an actual office—it merely had a storage room. The distance, therefore, that J.R. moved Chan was not particularly great given the size of the restaurant, which Chan testified was “small.” Perhaps more important is Chan’s testimony that J.R. wanted to see the storage room in order to find additional valuables, and was upset that the room “did not have the things he wanted.” Like the movements in *Sheldon* and *Hoard*, Chan’s movement was incidental to the robbery and, therefore, insufficient evidence on which to base the kidnapping finding.

Nor did the movement of Chan from one section of the restaurant to another increase the risk of harm to Chan. In fact, the opposite is the case, as it was in *Hoard*, given that Chan was no longer in a position to attempt to thwart the robbery taking place.

In making the contrary argument, the People rely on a number of cases that are factually distinguishable from this one. In *People v. Vines* (2011) 51 Cal.4th 830, 871, the victims of a robbery were moved “from the front of the store, down a hidden stairway, and into a locked freezer.” The court concluded that, in this situation, it could not “say the ‘scope and nature’ of this movement was ‘merely incidental’ to the commission of the robbery. Additionally, the movement subjected the victims to a

⁶ *Sheldon* and *Hoard* follow a long line of cases in which a robbery victim’s movements within and around the location of the robbery in search of further valuable items have been found to be insufficient asportation to amount to kidnapping. (See *People v. Brown* (1974) 11 Cal.3d 784, 788-789 [insufficient asportation where victim forced to move through house and then outdoors], abrogated in *People v. Martinez* (1999) 20 Cal.4th 225, 234-239; *People v. Daniels* (1969) 71 Cal.2d 1119, 1140 [when defendant “does no more than move his victim around inside the premises in which he finds him—whether it be a residence, as here, or a place of business or other enclosure—his conduct generally will not be deemed” kidnapping under section 209.]

substantially increased risk of harm because of the low temperature in the freezer, the decreased likelihood of detection, and the danger inherent in the victims' foreseeable attempts to escape such an environment." None of this is true here. The storage room was no more dangerous an environment than the dining room. The restaurant was closed and it was late at night. Moving from the dining room to the storage room in such a small space cannot be said to decrease the likelihood of detection in any material way. Finally, Chan was not locked in the storage room and did not feel any need to escape. Rather, he waited until he was certain that J.R. had left the restaurant before he went back into the restaurant.

Relying on *People v. Arias* (2011) 193 Cal.App.4th 1428, 1434-1435 (*Arias*); *People v. Shadden* (2001) 93 Cal.App.4th 164, 168-169(*Shadden*); and *People v. Smith* (1995) 33 Cal.App.4th 1586, the People characterize Chan's movement from the dining room to the storage room as a movement away from a public area to a more private one in which Chan was exposed to greater risk of harm because any crime would then be undetected. These cases are inapposite. In *Arias*, the victim was moved from a public area to "the seclusion of his apartment," which increased his risk of harm in that he was moved from a public area to the seclusion of his apartment. Similarly, by scaring Luna into moving away from a public place, it was less likely defendant would have been detected if he had committed an additional crime. Here, Chan's movement did not make detection less likely. The People attempt to characterize the restaurant dining room as more open than the storage room. However, it was quite late at night and the restaurant was closed. In this circumstance, one place was not more public than the other.

Similarly inapposite is *Shadden, supra*, 93 Cal.App.4th 164. In that case, the defendant argued that he should not have been convicted of kidnapping because his movement of the victim was incidental to the crime, as well as insubstantial. The court disagreed, holding that "[w]here a defendant drags a victim to another place, and then attempts a rape, the jury may reasonably infer that the movement was neither part of nor necessary to the rape. [Citations.] Shadden pulled off Christa M.'s panties and pulled down his zipper after he dragged her to the back room and shut the door. The jury could

reasonably infer that the movement was not incidental to the attempted rape because Shadden only began the sexual attack after he moved her.” (*Id.* at p. 169.) Here, in contrast, the movement of Chan was part of an ongoing robbery and a separate crime did not take place after Chan was moved to the storage room.

The defendant in *Shadden* also argued that his movement of the victim from the floor of the video store (which was open at the time) into a room in the back of the store that was out of view of the store’s customers did not increase the victim’s risk of harm. The court disagreed, noting that the victim was moved “from a public area to a place out of public view . . .” (*Shadden, supra*, 93 Cal.App.4th at p. 169) and, therefore, the risk of harm to her was increased by this movement. This is not what took place in this matter. The restaurant was not open and, therefore, the dining room was not “public” as it was in the case of the open video store in *Shadden*. Moving Chan from one closed section of a small restaurant to a storage room in the back of the restaurant did not, therefore, increase the risk of harm to Chan.

Because substantial evidence does not support the juvenile court’s true finding as to the kidnapping charge, we reverse that finding.

B. *False Imprisonment*

The juvenile court found proven both kidnapping and false imprisonment charges. Because we have reversed the court’s true finding as to kidnapping, we need not decide the issue of whether false imprisonment is a lesser included offense of kidnapping, which in any event, the People concede. (*People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 819; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121.)

C. *Petty Theft*

The juvenile court found proven the allegations of both robbery and petty theft. In so doing it erred because petty theft is a lesser included offense of robbery. (*People v. Ortega* (1998) 19 Cal.4th 686, 692, overrules on another point in *People v. Reed* (2006) 38 Cal.4th 1224.) The People properly concede this point. The petty theft finding is, therefore, reversed.

D. *Robbery*

J.R. contends that his robbery sentence should have been stayed pursuant to section 654 because it had the same objective as the kidnapping count. Given that we have reversed the kidnapping count, we need not decide this issue.

E. *Second Degree Burglary*

J.R. was sentenced to consecutive terms for burglary, robbery and kidnapping. He argues that the juvenile court erred in doing so under section 654, which bars multiple punishments for the same offense. Because we have reversed the court's kidnapping finding, we will consider only the issue of the consecutive terms imposed for burglary and robbery, which we conclude were not in error.

Under section 654, subdivision (a), "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." As the court in *People v. Le* (2006) 136 Cal.App.4th 925, 931, explains, " 'Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.' (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) It is the defendant's intent and objective that determines whether the course of conduct is indivisible. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Thus, ' "[i]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." ' (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297, quoting *People v. Harrison* (1989) 48 Cal.3d 321, 335."

J.R. argues that the true findings for robbery and burglary violate the section 654 ban on multiple punishments because both offenses were part of an "indivisible course of conduct," namely the robbery of the restaurant. Our review of the record indicates otherwise. J.R. entered the restaurant twice. The first time he entered, he did so alone, returning with food he had stolen from the kitchen. After J.R. and his companions ate the food, they entered the restaurant a second time. On this second foray into the restaurant,

they stole money from Chan's wallet and from the cash register and attempted to rob the restaurant's storage room.

In *People v. Bowman* (1989) 210 Cal.App.3d 443, 449, superseded by statute on other grounds as explained in *People v. Green* (2011) 197 Cal.App.4th 1485, 1492-1493, a defendant committed a number of burglaries in the course of an evening. The *Bowman* court found that although the crimes were committed in close temporal and geographic proximity, each individual break-in would be considered to have been committed with a "separate felonious intent" regardless of whether they involved the same type of intent. In *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255, the court observed that crimes will be considered separate for the purposes of section 654 when "the defendant had the opportunity to reflect after the first entry, and nevertheless entered the premises again." That being the case here, we will not disturb the trial court's imposition of consecutive sentences.

F. *Dissuading a Witness*

The juvenile court sentenced J.R. to a term of one year to be served consecutively for the offense of dissuading a witness (§136.1, subd. (b)). He argues that this count should be stayed pursuant to section 654 in lieu of the robbery offense.⁷

In sustaining the witness dissuasion count, the court stated: "As to Count 6, dissuading a witness from reporting a crime, it's clear they didn't do anything to dissuade him; in other words, they didn't threaten him and say if you call the police we're going to come back and get you or something of that sort; however, the way the statute is written it's either dissuading a witness or preventing or attempting to prevent him from reporting the crime. And it seems clear to me that cutting the telephone lines was done for exactly that reason, that they were trying to prevent him or at least slow him down from making a report to the police. [¶] I can't think of any other reason really for cutting the phone lines

⁷ We need not consider J.R.'s additional contention that the court's imposition of consecutive sentences for kidnapping and dissuading a witness violates section 654 because we have reversed the kidnapping finding.

than that. I believe that's why they did it. And so on that basis, I'm going to find that Count 6, a violation of section 136.1 of the Penal Code, was committed.”⁸

Defendant argues that because the phone cable was cut while the robbery was in progress this offense should have been stayed pursuant to section 654. We disagree. Here, the phone lines were cut with an intent that was separate from the robbery itself. In *People v. Coleman* (1989) 48 Cal.3d 112, the defendant argued that he could not be guilty of both an assault committed to keep a robbery victim from reporting a crime and the robbery of the same victim. The court held, however, that “[t]here is ample evidence to support the trial court’s implicit finding that defendant’s intent and objective in assaulting Karen, by stabbing her, was separate from, rather than incidental to, his intent and objective in committing the robbery. Prior to the assault, defendant had essentially completed the robbery by compelling Karen to assist and not interfere with his gathering the valuables and preparing for flight. Ms. Neidig then entered the kitchen, and defendant killed her with the shotgun. He next ordered Karen to lie down and stabbed her in the back. The trial court could properly conclude that defendant committed the assault with the intent and objective of preventing the victim from sounding the alarm about the murder, and that this intent and this objective were separate from, not incidental to, the robbery.” (*Id.* at pp. 162-163.) This holding is clearly applicable here.

G. Misdemeanor and Felony Offense Levels

The juvenile court failed to exercise its discretion in setting the offense levels for the sustained counts as required by Welfare and Institutions Code section 702. The People properly concede error and, therefore, the matter is remanded to the juvenile court to remedy this error.

⁸ Section 136.1, subdivision (b)(1), provides that “every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer”

H. *Maximum Term of Confinement*

J.R. correctly points out that, in calculating the maximum term of confinement for the consecutive terms, the court did not follow section 1170.1, subdivision (a), which provides that a consecutive term shall be calculated as one-third the mid-term. The People concede error and, on remand, the court shall reduce the sentences on the consecutive terms to one-third the midterm, as required by section 1170.1, subdivision (a).

I. *Probation Conditions*

Three of the probation conditions imposed by the juvenile court should have—but did not—contain a “knowledge” provision. Consistent with *In re Sheena K.* (2007) 40 Cal.4th 875, 889-892 and *In re H.C.* (2009) 175 Cal.App.4th 1067, 1070-1071, the People correctly concede that these conditions should be modified to reflect such a requirement. Accordingly, the conditions that must be so modified are, first, the condition that J.R. not associate with “any person that your parent or your probation officer may specify,” second, that he “stay out of places where alcohol is the chief item of sale” and not possess drugs or alcohol and third, that he have no contact with various persons involved in this matter.

We disagree, however, that the condition that J.R. not possess items whose “chief purpose is to promote drug or alcohol use” is vague, overbroad and unconstitutional. A probation condition is unconstitutionally vague if it is not “sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.” (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324–325; see *In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) Probation conditions are interpreted with common sense and in context. (*In re Ramon M.* (2009) 178 Cal.App.4th 665, 677.) The ultimate question is whether ordinary people can understand what behavior is prohibited by the condition. (*In re Byron B.* (2004) 119 Cal.App.4th 1013, 1018.)

Here, an ordinary person would have little difficulty understanding what this condition meant. The phrase to which J.R. takes exception—“chief purpose”—is

sufficiently precise to permit an ordinary person to interpret it. Despite J.R.’s argument to the contrary, an ordinary person would understand that an item of clothing—or any other item—bearing the logo of a beer company, for example, has, as its “chief purpose” the promotion of alcohol use.

Nor is it the case, as J.R. argues, that this condition infringes on his first amendment right to free speech without being reasonably related to his rehabilitation. Given that J.R.’s offenses occurred when he was “under the influence of Percocet, Norco” and hard alcohol, and that he told the social worker involved in this matter that he had a “problem with drugs, especially pills, [] marijuana, and alcohol,” the probation condition contributes to his rehabilitation by making the glorification of drug and alcohol use—both illegal activities for minors—off limits. Pursuant to Welfare and Institutions Code section 730, subdivision (b) this condition is “fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.”

J. *Indian Child Welfare Act*

The petitions filed in this matter identified J.R. as potentially having “Indian ancestry.” The detention report indicated that J.R. belonged to the Wintu tribe and stated that the Indian Child Welfare Act “does or may apply” to him. The disposition report stated that J.R. was “in the process of attaining membership in the Wintu Tribe,” that he and his mother were “active in tribal activities,” and that the Indian Child Welfare Act “does or may apply.” There is no evidence in the record that written notice was provided to the Wintu Tribe of J.R.’s potential status as an Indian child. The issue, then, is whether it should have been.

J.R. argues that this matter must be reversed and remanded to the juvenile court to comply with the notice requirements of Welfare and Institutions Code section 224.3 and the Indian Child Welfare Act.⁹ The People, on the other hand, maintain that the Indian Child Welfare Act does not apply to cases in which a petition under Welfare and

⁹ The Federal Indian Child Welfare Act (ICWA) governs child custody proceedings involving Indian children. (25 U.S.C. § 1901 et seq.)

Institutions Code section 602 alleges acts that would be criminal if charged against an adult.¹⁰ We conclude that, even if the Indian Child Welfare Act is construed so as to apply to delinquency proceedings such as those in which J.R. is involved, it does not apply here because J.R. was not at risk of entering foster care, as required under Welfare and Institutions Code section 224.3, subdivision (a).

By way of background, we note that federal law exempts from the ICWA notice requirements any proceeding in which a child's placement is the result of actions that would be considered criminal if an adult had committed them. California law in this area, however, has a broader reach than federal law. Welfare and Institutions Code section 224.3, subdivision (a) provides that "[t]he court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings *if the child is at risk of entering foster care or is in foster care.*" (Italics added.)

"Foster care" is defined in Welfare and Institutions Code section 727.4, subdivision (d)(1) as "residential care provided in any of the settings described in Section 11402."¹¹ Welfare and Institutions Code section 11402 specifies that the following placements constitute "foster care": "(a) The approved home of a relative . . . [¶] (b)(1) The licensed family home of a nonrelative. [¶] (2) The approved home of a nonrelative

¹⁰ One court of appeal has held that ICWA applies to delinquency proceedings such as those conducted here. (*R.R. v. Superior Court* (2009) 180 Cal.App.4th 185, 193.) The Supreme Court has granted review of a decision disagreeing with this conclusion. (*In re W.B.* (2010) 182 Cal.App.4th 126, rev. granted May 12, 2010, S181638).

¹¹ J.R. argues that we should apply the broader federal definition of foster care in determining whether the Bar O Boys Ranch constitutes foster care so as to mandate notice under the ICWA. He is incorrect. Here, the Legislature has clearly defined "foster care" in situations involving notice in juvenile delinquency cases. We see no reason to, instead, apply a general definition that was not crafted specifically for this situation when that more specific definition already exists.

extended family member . . . [¶] (c) A licensed group home . . . [¶] (d) The home of a nonrelated legal guardian . . . [¶] (e) An exclusive-use home. [¶] (f) . . . a licensed transitional housing placement provider . . . [¶] (g) An out-of-state group home . . . [¶] (h) An approved supervised independent living setting for nonminor dependants”

J.R. was committed to the Bar O Boys Ranch, a facility established pursuant to Welfare and Institutions Code section 881. A county-run boys ranch such as the Bar O is not one of the placements described by Welfare and Institutions Code section 11402. (See *In re Steven E.* (1991) 229 Cal.App.3d 1162, 1166 [distinguishing between county-run juvenile home, ranch, camp, or forestry camp and group home].)

Nor is there any evidence in the record that foster care was ever recommended or considered by the court. To the contrary, the court made clear that J.R.’s crimes were serious felonies and that the district attorney could have chosen to pursue them as adult crimes in which case, if found guilty, J.R. “would have found [himself] in state prison.” Therefore, even if the ICWA applies to juvenile delinquency proceedings, the juvenile court would not have been required to give notice under the ICWA.

K. *Conflict of Interest*

J.R. argues that the trial court erred in reappointing Darren McElfresh, an attorney who had earlier been disqualified in this matter, to represent him at the conclusion of the proceedings. We agree.

McElfresh explained to the court prior to the introduction of the petition involving the robbery at the restaurant, “I’m intimately familiar with the facts. Normally, I would tell the man to immediately deny; however, the victims I represented as business clients in the past, [the restaurant’s] owners . . . in the capacity as a business attorney for them.” The court asked McElfresh if he wished to declare a conflict and he replied, “I probably should. I know their son Sammy, and I eat with them in the past and have had lunch with them.” Mr. McElfresh was discharged and new counsel appointed to represent J.R.

McElfresh also identified a conflict as to the petition involving the July 4 robbery at the Denny’s restaurant. He told the court “I can’t argue it because of my conflict. I’ve got twenty pages of reports. . . . Mind you, there might be a kernel in here that’s, you

know, good for my client that should be brought up regarding detention.” The court relieved McElfresh of his representation of J.R.

At the conclusion of this matter, despite the fact that he had been excused due to a conflict as to both petitions filed against J.R., the juvenile court reappointed McElfresh. In so doing, it erred.

The Rules of Professional Conduct, rule 3-310 provides that “A member shall not accept or continue representation of a client without providing written disclosure to the client” when the member knows or should know that the member “previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and . . . the previous relationship would substantially affect the member’s representation”

Disqualification is mandatory when both prongs of the rule are met. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.)

McElfresh identified and clearly had a conflict in this matter that met both prongs of Rule 3-310. He disclosed to the court that he had a previous legal and personal relationship with Chan, one of the victims and witnesses in this matter. He also informed the court that this relationship would affect his representation. There is nothing in the record to indicate that the grounds for McElfresh’s disqualification had changed between the time he was disqualified from representing J.R. and when he was appointed at the conclusion of the sentencing hearing to represent J.R. in future hearings with regard to this matter.

The People, however, argue that the proceedings involving Chan were “essentially” at an end when McElfresh was reappointed. This is incorrect. As J.R. points out, the trial courts order made clear that it retained jurisdiction to, among other things, increase the amount of retribution J.R. would pay Chan, the restaurant’s owner. McElfresh, therefore, was appointed to represent a client in a matter involving a former client, whose injury in this matter affected his ability to represent J.R. effectively. This was error.

Nor is it the case that an “actual” conflict is required before the court is required to disqualify McElfresh. The People’s reliance on *Mickens v. Taylor* (2002) 535 U.S. 162, 168 and *Strickland v. Washington* (1984) 466 U.S. 668, 692, cases in which actual conflict establishes prejudice for the purpose of showing ineffective assistance of counsel, is misplaced.

Therefore, we remand this matter to the juvenile to either disqualify McElfresh from representing J.R. in either petition or to obtain a waiver that allows him to do so.

IV. DISPOSITION

We remand this matter for proceedings consistent with our opinion. In all other respects, the judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.